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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1961

No. 667

In the Matter of the Petition of Moore-McCormack Lines, Inc., as Owner of the S.S. "Mormackite" for Exoneration from or Limitation of Liability.

JEAN O. RICHARDSON, Individually and as Executrix of the Estate of HARALD H. RICHARDSON *et al.*,

Petitioners,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Richardson, Rosario, DeJesus, Hernandez, Henry, Sullivan, Del Valle, Williams, Cadiz, Wall and Berk pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action pursuant to its decision dated October 25, 1961.

Citations to Opinions Below

The opinion of the Court of Appeals (Lumbard, Chief Judge, Madden and Waterman), which in part modified, in part reversed and remanded and in part affirmed the District Court for the Southern District of New York (McGohey, D.J.) is reported at 295 Fed. 2d 583. A copy thereof is contained in appendix at pages 21-47. The District Court's opinion is reported in 184 Fed. Supp. 585.

Jurisdiction

The judgment of the Court of Appeals was entered on 25th day of October, 1961. Petitioners have not applied for any extension of time to petition for certiorari. Jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254.

Questions Presented

1. Where a district court judge sitting in admiralty has awarded damages for the deaths of seamen occurring on the high seas brought about by the negligence of the ship owner, is it proper to deduct from these awards group type insurance payments made by a private insurance company to designated beneficiaries for the loss of life as well as for lost personal effects? - -

2. Where the Court of Appeals reversed the District Court which as matter of law disallowed pre-judgment interest in the death actions and allowed such interest, was it proper for the Court of Appeals (1) to limit that

interest to only that portion of the damages which reflected lost contributions up to the time of the judgment; (2) to direct that such interest run from the several dates at which the sums would have accrued rather than from the date of the deaths; (3) to direct that such interest be computed at four percent; (4) to direct that the interest on the District Court judgment be limited to 4% until the entry of the decree on mandate?

3. The District Court in evaluating the compensation that the seamen were entitled to for pain and suffering endured while afloat in the ocean until such time as they were rescued or died, relied on its personal observations of the surviving seamen as to how the experiences affected them in body and mind and fixed the damages at $300 an hour. Does the Court of Appeals, which did not see or hear the seamen so as to be able to judge the effects of the experiences on them, have the power, arbitrarily and without pointing to any clear error, to reduce the award to $150 an hour on the ground that it thought the District Judge's award was too much?

4. Does the Court of Appeals have the power to reduce by 50% the District Court's evaluation of the pecuniary damage suffered by Berk's next of kin as a result of his death?

Statutes Involved

The statutes involved are the Death on the High Seas Act, 46 U. S. C. 701, 762, and the Jones Act, 46 U. S. C. 688, printed in pertinent part in the appendix hereto, *infra*, at pages 19-20.

Statement

On the morning of October 7, 1954, more than 7 years ago, the S.S. Mormackite capsized off Cape Hatteras. Thirty-seven lives were lost. Eleven persons survived. After a 6 week trial on the issues of liability and limitation, the District Court, sitting in admiralty, found the owner, Moore-McCormack Lines, liable without limitation to the claimants for death and personal injury damages. *Petition of Moore-McCormack Lines, Inc.*, 164 Fed. Supp. 198 (S. D. N. Y. 1958), affirmed as to the personal injury and wrongful death claims in 272 F. 2d 873 (1959), cert. den. 362 U. S. 998 (1960).

The District Court then proceeded to try each of the personal injury and death claims. Seven personal injury actions and four death actions were tried. The men who died spent 10 to 27 hours in the water before their demise. The men who survived spent 46 to 50 hours in the water before they were rescued. They suffered experiences of the most harrowing kind. They described how they held on to floating wreckage, how they drifted apart, how they were battered by the waves, how they were attacked by sharks, how they saw companions die after such attacks, how they suffered from thirst and hunger, how they were affected by the action of the salt water, as well as their agonies when ships would pass them by. Some of the men literally went out of their minds. Judge McGohey listened to them, watched them very closely (32a)*, observed their reactions as they related their experiences and came to the conclusion that the reactions he observed were genuine (32a, 38a). On the basis of his observations as well as

* Small (a) page references are to Moore-McCormack's Court of Appeals appendix.

various records in evidence, he found that the compensation for the pain and suffering endured by them during those hours should be $300 an hour. This was apart from his making other findings of damages with respect to earnings, past and prospective, post-rescue pain and suffering, and medical expenses.

Judge McGohey refused to allow interest in the death damages as a matter of law (14a).

The trial judge also deducted from the death awards payments made to designated beneficiaries of group type insurance policies issued by the Indemnity Insurance Company of North America, to Richardson, Berk and Cadiz.

Cross appeals were taken to the Court of Appeals. On the ship owner's application the Court of Appeals reduced the award for pain and suffering from $300 an hour to $150 an hour, stating that it thought $300 an hour was excessive (Appendix p. 24). No reason was assigned for its conclusion.

On the wrongful death claimants' application the Court of Appeals reversed the trial judge and allowed pre-judgment interest in the death cases. However, the interest was limited to that portion of the award which constituted loss of contributions up to the time of the judgment. In addition the Court of Appeals directed that the interest be computed not from the date of death but from the several dates at which the sums would have accrued (Appendix p. 40). It further directed that all interest computations prior to decree on mandate be limited to a four per cent rate (Appendix p. 40).

The Court of Appeals affirmed the deductions of the payments made by the insurance company (Appendix p. 30). It also reduced the pecuniary damages awarded to the parents of Berk from $20,000 to $10,000 (Appendix p. 28).

Reasons for Granting Writ

A. As to First Question Presented:

The deduction of payments made to beneficiaries under the Indemnity Insurance Company of North America policy was contrary to the well-established rule in wrongful death actions that insurance benefits received by the next-of-kin do not mitigate a tort feasor's responsibility for the damages he has caused. *Standard Oil of Calif.* v. *U. S.*, 153 F. 2d 958 (9th Cir.), affirmed 332 U. S. 301; *Hudson* v. *Lazarus*, 217 F. 2d 344 (C. C. A. D. C.), *Sainsbury* v. *Pennsylvania Greyhound Lines, Inc.*, 183 F. 2d 548 (4th Cir.); *Chicago Great Western Ry. Co.* v. *Peeler*, 140 F. 2d 865 (8th Cir.); *Brabham* v. *Baltimore & Ohio R. R. Co.*, 220 Fed. 35 (4th Cir.); *Healy* v. *Rennert*, 9 N. Y. 2d 202.

Moore-McCormack's payment of the policy premiums do not affect the rule. These premium payments were a condition of the seamen's employment in the same way as payment of their wages. It was in the nature of additional compensation for the services being rendered by them. *Plaink* v. *Sommers*, 203 Md. 598, 102 Atl. 2d 253.

The duty of the trier of the facts was to "ascertain the pecuniary loss which the widow and children sustained by the death of the husband and father and any benefits which they received by way of insurance or pension are not to be offset or deducted." *Geary* v. *Metropolitan Street Railway Company*, 73 App. Div. 441 (New York). The effect of the

ruling below was to take $5300.00 or $5500.00 from the damages that the next of kin were entitled to, and give it to Moore-McCormack—even though Moore-McCormack had never paid that sum to anyone. There is no warrant for such a confiscatory procedure. *U. S.* v. *Harue Hayashi*, 282 F. 2d 599 (9th Cir.).

Further, in permitting this deduction, the District Court has treated the individual recipients of the insurance benefits in each case as being identical with the statutory beneficiaries entitled to share in the death benefits under the Jones Act and the Death on the High Seas Act. It is clear that the legal representative of an estate, though authorized by the pertinent statutes to file a suit of this type, receives the damages awarded only as a trustee for the statutory beneficiaries. All amounts received by an administrator or an administratrix in such a case, are not to be subject to offsets or deductions claimed by the steamship company for amounts paid by a private insurance company to specific and designated insurance beneficiaries. *Wright* v. *Cion Corp. Peruna Devaspores*, 171 Fed. Supp. 735, 743 (SDNY, 1959). *Petition of Panama Transport Co.*, 98 Fed. Supp. 114, affirmed 195 F. 2d 104 (2d Cir.).

The deductions were all the more erroneous because the right to interpose offsets in admiralty suits is strictly limited to claims arising out of the same transaction as that on which the initial suit is based. *U. S.* v. *Isthmian SS Co.*, 359 U. S. 314, 79 S. Ct. 857 (1959). A claim for damages for wrongful death inuring to the benefit of next of kin named in applicable federal statutes, represents an entirely different cause of action from one based on a contractual group insurance policy (setting forth a stipulated fixed amount) for the benefit of a particular individual named therein.

The general rule is even more stringent in seamen's suits. The familiar admiralty rule is that setoffs against seamen in actions brought by them are not favored in the absence of specific Congressional legislation permitting such deductions. *Isbrandtsen Company, Inc.* v. *Johnson*, 343 U. S. 779, 72 S. Ct. 1011.

In view of the foregoing conflict in rulings between the Second Circuit and the other circuits, the ruling herein should be reviewed.

B. As to the Second Question Presented:

(1) Limitation of the Interest to Lost Contributions up to the Time of the Judgment

We submit that interest should have been allowed on the entire damage award for the following reasons:

An action for pecuniary damages occasioned by wrongful death must be distinguished from the survival aspects based on the claim for damages for personal injuries with attendant pain and suffering until the death. Under the wrongful death aspects of the statutes involved (as distinct from the surival aspects of such statutes, which permit recovery for pain and suffering, etc.), nothing can be recovered for pain or suffering of the deceased if he lingers before dying, or for any of the other factors that constitute personal injury damages. The only damages recoverable are the pecuniary damages suffered by the dependents, or the next of kin, or other beneficiaries specified by the death statute. *Van Beeck* v. *Sabine Towing Company*, 300 U. S. 342, 348; *Matter of Meekin* v. *B. H. R. R. Co.*, 164 N. Y. 145.

Such damages are necessarily limited to pecuniary losses since the dependents or next of kin or other beneficiaries suffer in no other manner—legally.

The deprivation of these pecuniary advantages to the dependents or next of kin is a property loss.

> "'the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created.'"
>
> *Van Beeck* v. *Sabine Towing Company*, 300 U. S. 342, 348.

Indeed, the death statutes "create a new property right or interest." *Van Beeck* v. *Sabine Towing Company*, *supra*, p. 349.

In the *Matter of Meekin* v. *B. H. R. R. Co.* 164 N. Y. 145, 149, the Court wrote:

> "The amount of damages in this class of cases depends upon the value of the reasonable expectation of pecuniary benefits from the continuance in life by the decedent to the husband or wife and next of kin. This is a right of property which becomes vested in the beneficiaries at the moment of death and can be converted into money through a statutory action brought for their benefit by the personal representatives, who are simply trustees for the purpose."

Then the Court wrote what is most appropriate to the instant case:

> "The damages bear interest from the date of the death, in accordance with the general rule relating to injuries to property, which is never applied in cases of injury to the person."

True, the Court was speaking of a statutory mandate to add interest. But the rationale of why interest is added to death action damages is precisely what we urge here as a necessary consequence of the traditional rule in admiralty courts to allow interest in property loss cases from the date of the loss.

The described property loss is one single pecuniary loss although composed of different elements. When, therefore, interest is allowed for the property loss, it should be allowed on the entire loss and not limited to any one component of it. The limitation of interest to but one aspect of the loss violates the maxim that is traditional in admiralty *restitutio in integrum*. *The President Madison* (9th Cir.), 91 F. 2d 835; *Stiles* v. *National Airlines, Inc.* (5th Cir.), 268 F. 2d 400, cert. denied 361 U. S. 885. The limitation denies the claimants the full value of their pecuniary loss. In *Stiles* v. *National Airlines, Inc.*, *supra*, interest on the damages awarded under the Death on the High Seas Act was allowed on the entire damage, not on any one phase of it.

The difference between the amount of interest which the death claimants would be entitled to under the *Stiles* ruling, and under the Court of Appeals ruling is considerable.

	Under Court of Appeals Ruling Interest to 12-1-61	*Under Stiles Decision Interest to 12-1-61*
Richardson	$ 9,005.85	$73,329.98
Wall	$10,354.57	$80,026.87

The difference in interest in the Cadiz and Berk actions is similarly considerable.

The above conflict between the circuits should also be resolved by the Court.

(2) The Refusal to Allow Interest from the Date of Death

If we are correct in our contention that death damages are a property loss, then the damages should have been allowed from the date of the loss, viz., the date of death. The property loss occasioned by a wrongful death is complete and determinable the moment the death occurs. Nothing that may happen after the death can affect the amount to which the beneficiaries were then entitled. The deceased's earnings, his prospects for advancement, his state of health, the domestic status of the dependents and all the other facts which determine the loss are fixed at the time of death and speak as of the date of the death. *Colman* v. *Moore*, 108 F. Supp. 425 (D. C.). In a death case "the injury and the resulting damage are complete, and the obligation of the defendant to pay is perfect at the instant of the death; and * * * an allowance of interest is quite essential to the accomplishment of full justice." *Bridenstine* v. *Iowa, etc. Co.*, 181 Iowa 1135, 1136.

Only by the allowance of interest for the property loss caused by the death from the date of death can there be that full compensation which the law mandates. The law which forbids recovery of damages for emotional or sentimental loss, or for grief for the death of a loved one, and directs a recovery only for a pecuniary loss, compels the evaluation of that loss in terms of its total replacement. This includes interest.

> "In the administration of justice, it is the purpose of the law to compensate the dependents as fully as money can for the loss sustained."
>
> *Browne* v. *Great Lakes Transit Corp.* (2nd Cir.), 5 F. 2d 58, 60.

In *Stiles v. National Airlines, Inc.* (5th Cir.) 268 F. 2d 400, 405, cert. denied 361 U. S. 885, the Court allowed interest on death damages awarded in admiralty pursuant to the Death on the High Seas Act from the date of death. Applying the doctrine of *restitutio in integrum*, it wrote:

> "It is quite obvious that a party suffering a financial loss from the death of a breadwinner, just as from the destruction of a ship, can be placed in the same position as he previously enjoyed only if the award is made at the time of the loss or if interest for the time between loss and payment is allowed."

Here again, the conflict in the circuits should be reviewed by the Court.

(3) The Four Percent Rate

If we are correct in our contention that the death damages are a property loss entitling claimants to interest as a matter of right, then it follows that the rate of interest should be at the legal rate, six percent, and not such rate as the District Court might in its discretion feel to be appropriate. Discretionary rates may be allowed when interest is a matter of discretion, but where the interest is a matter of right then the legal rate should be the one used.

C. As to the Third Question Presented:

It is well settled that the findings of the District Court sitting in admiralty may not be set aside unless "clearly erroneous" *McAllister v. U. S.*, 348 U. S. 19, 20. Where is there clear error in the District Court's evaluation of the pain and suffering that were endured by these men? The Court of Appeals has not pointed to any such error. It

merely stated, "We think $300 per hour for pain and suffering on the water was excessive." (Appendix p. 24).

We submit that this is an arbitrary and capricious basis for reversing a District Court finding, particularly where that finding was based on something that only the District Court was in a position to consider—the *observable* effects of the experiences on the minds and bodies of those who underwent them. This is not a question of credibility. It is a question of actual observation, a tool of judgment that only the District Court was in a position to utilize and that the Court of Appeals could not and did not have available to it. It is to be noted that the District Court observed a number of the survivors twice, once during the liability trial, and again during the damage trial.

The Court of Appeals said there is no way in which suffering could be measured by money (Appendix p. 24). But then it proceeded to do so without the benefit of those tools of judgment. We do not deny the power of the Court of Appeals to make new findings where the District Court's findings are clearly erroneous, but we do say, however, that the Court of Appeals may not make such new findings on an incomplete record. The complete record in so far as the issue of pain and suffering was concerned in this case was not only what the men said, but also how they acted and reacted. Evaluation of the latter required personal observation of the men, of their reactions, mental and physical, of their appearance, of their way of talking and responding. The Court of Appeals did not have that part of the record, that part of the evidence, before it. Accordingly it was in no position to fully consider the issue—only the District Court could do that with complete propriety.

We submit therefore, that the Court should review the question of whether the Court of Appeals has the power to make new findings with respect to an issue concerning which it does not have all of the evidence before it.

D. As to the Fourth Question Presented:

Berk, the 3rd assistant engineer, was only 25 years of age at the time of his death. He admittedly made his home with his parents (aged 46 and 54) and his younger brother (aged 14).

Berk had graduated from the Merchant Marine Academy in July, 1952, following which he had immediately gone to work, at the age of about 22, working steadily until the time when he was drowned, less than two and one-half years later, as a result of the sinking early in October, 1954. During his lifetime, he had executed allotments in favor of his mother, covering most of the period during which he went to sea. (See claimant's Exhibit 7.) The Trial Judge found that most of the allotment checks were deposited by the mother in a trust account for her son, and held that they were Berk's savings. It also found as a fact, however, that even apart from other gifts and contributions, the documentary evidence established that during this short two and one-half year period during which he was a ship's officer, Berk gave his parents $5,000.00 toward the erection of a home by them, and an additional $2,200.00 toward the equipping of that new home. He was earning more than both parents combined.

Having given them a total of at least $7,200.00 within less than two and one-half years prior to his death, the District Court also found that in each of the five years

following his death, from 1955 through 1959 (the date of the trial), had Berk lived, he would probably have contributed about $1,000.00 annually to his parents, and $50.00 annually to his younger brother. This was certainly a modest, conservative appraisal.

As to the period beyond 1959, the District Court stated that it was not fixing the specific annual amount of probable payments with precision, for whether Berk would have contributed more than $1,040.00 or less annually beyond 1955 was a variable factor dependent upon (a) the possible increased need of the parents as they grew older and gradually became unable to work as wage earners; and (b) the possibility that Berk might marry.

While in high school and while attending the United States Merchant Marine Academy, Berk was well above the average student academically (see claimant's Exhibits 2 and 3), and Lieutenant Commander Geary, of the United States Merchant Marine Academy, had written of him:

> "His progress reports were excellent in all respects. His officers spoke well of his ability and considered him to be good officer potential."

It seems reasonably clear that as a 3rd assistant engineer at age 25, already earning about $10,000.00 a year by the time he died, a bright career lay ahead, to which Berk could look forward with reasonable confidence.

The District Court used the U. S. Life Tables of 1949-1951 to obtain life expectancies. According to these life tables, at the time the disaster occurred, the mother (at 46 years of age) had a life expectancy of about 30 years, and at the time of the trial in 1959, when the mother was

51 years old, she still had a life expectancy of 26.40 years. Had an up-to-date table been available, her expectancy would undoubtedly have been even greater. With reference to the use of life tables, the Court has said in *O'Connor, Admx.* v. *U. S.*, 269 F (2d) 578 (C. A. 2, 1959) at page 584:

> "This is a computation based on averages; it is not conclusive, and the court may give it such weight as it deems reasonable in the light of the other evidence of the individual involved."

Continuing studies made by the Bureau of Labor Statistics (U. S. Department of Labor) demonstrate that longevity, as well as a man's working life, are definitely on the increase in the United States. (Seymour L. Wolfbein of the U. S. Department of Labor, Bureau of Labor Statistics: "The Changing Length of Working Life" published in the proceedings of the Seventh Annual Meeting of the Industrial Relations Research Association).

Ewan Clague, the Commissioner of Labor Statistics (U. S. Department of Labor), in an address entitled "Prices, Wages and Productivity"*, has pointed out that during the 20 year period from 1939 to 1959, hourly earnings have increased 3½ times, and that the Consumer Price Index has more than doubled.

The inflationary trend has also been discussed in many articles, such as the one dealing with the post-war increase in earnings, which appeared in the Monthly Labor Review

* Presented before the Labor Relations and Arbitration Conference, University of California, San Francisco, California, May 25, 1959.

of August, 1960.** The statistics which dealt with the period from 1947 to 1960, showed an 80% increase in earnings for the 13 year period, and a 40% increase in purchasing power. These articles made it clear that if fringe benefits are included, the gradual increase in earnings over the years would represent an even higher percentage.

Taking many of the above factors into consideration, and probably also making some allowance for the fact that gradual increasing wage trends and the depreciating value of the dollar would have some effect in offsetting the 4% discount table, the Trial Court found that the pecuniary damages sustained by the parents of Berk amounted to $20,000.00.

However, on appeal, the Court of Appeals reduced this pecuniary damage award to only $10,000.00, on the ground that the Trial Judge should have found that Berk might reasonably have been expected to give his parents only about $500.00 per year (instead of $1,000.00 per year, as found by the Trial Judge). In other words, it cut these damages in half, just as it cut the hourly damages for pain and suffering by half. It then applied a rather strict mathematical and rigid pecuniary damage evaluation.

With all due respect, it would seem that the District Judge, who observed the witnesses and heard the evidence, was in a better position to determine what the future contributions of the son would reasonably have been, and that the Appellate Court had no right to usurp the Trial Court's functions; and that the Court of Appeals had no power

** "Trends in Earnings of Factory Workers, 1947 to 1960" by Stern and Travis (Division of Manpower and Employment Statistics, Bureau of Labor Statistics).

to arbitrarily substitute its own evaluation of the parents' pecuniary loss, particularly where it could not be said that the findings of the District Court were "clearly erroneous".

Furthermore, strict arithmetical attempts to ascertain pecuniary damages in cases involving a child's death, have recently been justly criticized as perpetuating archaic and out-moded "bloodless bookkeeping", not consistent with modern evaluations of the value of a child's life. (See *Wycko, Adm. v. Gnodtke*, 361 Mich. 331, 105 N. W. (2d) 118 (1960).) The type of evaluation made by the Court of Appeals in this case appears to be in direct conflict with the more enlightened, humane concepts recognized as applicable to modern litigation in the *Wycko* case.

We submit, therefore, that the Court should rule on the question of whether the Court of Appeals acted arbitrarily in thus reducing by half the pecuniary damages found by the District Court, and also whether the concepts enunciated in the *Wycko* case should be recognized as applicable to litigation under the Jones Act and the Death on The High Seas Act.

Conclusion

In view of these considerations, the petitioners respectfully submit that this petition should be granted.

Respectfully submitted,

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APPENDIX

Applicable Statutes

46 U. S. C. 688 Recovery for Injury to or Death of Seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

46 U. S. C. 761 Right of Action; Where and by Whom Brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Appendix

46 U. S. C. 762 Amount and Apportionment of Recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Appendix

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 157—October Term, 1960.
(Argued February 10, 1961 Decided October 25, 1961.)
Docket No. 26485

MOORE-MCCORMACK LINES, INC.,
Petitioner-Appellant-Appellee,

v.

JEAN O. RICHARDSON, *Individually and as Executrix of the Estate of Harold R. Richardson,*
Claimants-Appellees-Appellants.

Before:

LUMBARD, *Chief Judge,*
MADDEN, *Judge,* United States Court of Claims,*
and WATERMAN, *Circuit Judge.*

Moore-McCormack Lines, Inc., appeals from a final decree in admiralty of the United States District Court for the Southern District of New York, John F. X. McGohey, *J.*, 184 F. Supp. 585, awarding damages on seven personal injury and four death claims for losses arising from the foundering of the S. S. Mormackite. The death claimants cross-appeal for, *inter alia*, interest from the date of the loss of the vessel.

Judgment modified as to five of the personal injury claims, reversed and remanded for further proceedings in

* Sitting by designation.

conformance with this opinion as to two of the personal injury claims, modified and remanded for determination of pre-judgment interest on the four death claims.

EUGENE UNDERWOOD, New York, New York (John J. Crowley, Robert A. Feltner, James W. Lynch, William M. Kimball, Burlingham, Hupper & Kennedy, New York, N. Y., on the brief), *for petitioner.*

BENJAMIN H. SIFF, New York, N. Y., John J. Martin, New York, N. Y., Louis R. Harolds, New York, N. Y. (Bernard Rolnick, for claimants Rosario, De Jesus, Hernandez, Henry, Sullivan, Del Valle, Williams; Joseph Friedberg, for claimant Cadiz; Bigham, Englar, Jones & Houston, New York, N. Y., and Arthur R. Hohmann, for claimants Richardson and Wall; Standard, Weisberg, Harolds & Malament, New York, N. Y., and Lee Pressman, for claimant Berk; Robert Kilroe and Henry N. Longley, New York, N. Y., on the brief), *for claimants-appellees-appellants.*

LUMBARD, *Chief Judge*:

Moore-McCormack Lines, Inc., appeals from a final decree of the United States District Court for the Southern District of New York in an admiralty proceeding awarding damages against Moore-McCormack to eleven claimants for losses resulting from the capsizing of the steamer "Mormackite" off Cape Hatteras on the morning of October 7, 1954, with the loss of 37 lives and a cargo of iron ore and cocoa beans. The death claimants cross-appeal,

challenging the district court's disallowance of interest from the date of death on the four death claims and the set-off against certain of the awards of the receipts from insurance policies on which Moore-McCormack had paid all the premiums.

In 1954 Moore-McCormack brought a limitation proceeding. 46 U. S. C. 183 *et seq.* After trial on the issues of liability and limitation, the district court found Moore-McCormack liable without limitation to all claimants, death, personal injury and cargo alike. *Petition of Moore-McCormack Lines, Inc.*, 164 F. Supp. 198 (S. D. N. Y. 1958). We affirmed as to the personal injury and death claimants, but upheld Moore-McCormack's right to limitation against the cargo claimants. *Moore-McCormack Lines, Inc.* v. *Armco Steel Corporation*, 272 F. 2d 873 (1959), *cert. denied*, 362 U. S. 990 (1960). The district court then proceeded to determine the amount to which each personal injury or death claimant was entitled. *Petition of Moore-McCormack Lines, Inc.*, 184 F. Supp. 585 (1960). From the resulting awards on four of the death and seven of the personal injury claims Moore-McCormack now appeals.[1]

Moore-McCormack, while not challenging the power of the trial court to award, upon sufficient proof, compensation for all items of damage making up the awards, objects to many of the awards as being excessive. It also contends that the district judge insufficiently detailed certain of the findings of fact and, on occasion, erred in his computation. That we have both the power and the duty to examine awards for excessiveness, even when the awards are made by a jury, seems well established. See *Dagnello* v. *Long Island R.R. Co.*, 289 F. 2d 797 (2 Cir. 1961). We do so here where the awards were made by a judge in admiralty.

1. Originally there were 48 death and personal injury claims. Of these 21 were settled prior to trial, 14 during the trial, and 2 pending this appeal, leaving the 11 claims now before us.

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The district court allowed damages for the pain and suffering endured by the members of the crew after the "Mormackite" capsized on October 7, 1954 at 9:45 A.M. at the rate of $300 per hour for each hour before death or rescue. The length of suffering varied from ten hours in the case of Carmen Cadiz, who the court found died at approximately 7:30 P.M. on the day of the sinking, to an award for fifty hours to Charles Henry, the last survivor to be picked up from the water. Thus these awards ranged from $3,000 to $15,000.

We think $300 per hour for pain and suffering while in the water is excessive. That the crew's experience before the death of most of them and the rescue of the remaining few was harrowing and bitter in the extreme is clear from Judge McGohey's summary at 184 F. Supp. 585, 589-90. We agree with the trial judge that there is no way of differentiating between the suffering of any deceased or survivor and that the award should be assessed on the same basis as to all. Concededly, there is also no way by which suffering can either be measured or compensated for in money. But courts are nonetheless required to do precisely that, and they have attempted to resolve this insolvable problem in scores of cases.[2] As the awards in each case turn on so many varied facts, no purpose would be served in citing precedents. However, from such guidance as the numerous decisions dealing with the problem afford, we conclude that the award of $300 an hour is excessive and that it should be reduced to $150 per hour. Since this is the only issue before us in the Sullivan, Henry, Hernandez and Williams claims, these awards are modified accordingly, and as so modified are affirmed, with interest from the date of the district court decree, June 3, 1960. We proceed

2. See e.g. cases collected at 16 A. L. R. 2d 3-300 (1951); 16 A. L. R. 2d 303-458; 17 A. L. R. 2d 832, 864-867 (1951); 17 A. L. R. 2d 872, 879-880 (1951).

to consider the other issues raised with respect to the seven other claims.

Claims From the Death of Harold Richardson

Richardson, the chief mate, was a competent officer and had made a distinguished record with the Moore-McCormack Lines. The district court found that he survived for twenty-four and one-half hours in the water before he died and allowed $7,350 for pain and suffering.

The district court allowed to the widow for herself and Richardson's two minor children damages totaling $184,361. Moore-McCormack claims error in the manner in which the court computed the present value of the future pecuniary loss to be $118,296, contending that this item should be reduced to $113,592. The trial court found the estimated loss for each year discounted by 4% and totaled the resulting figures. Moore-McCormack urges that an average annual loss for the decedent's entire remaining working life expectancy be calculated and the present cost of an annuity paying that sum be awarded. As the district court found that Richardson's beneficiaries would have received more for the years 1962 through 1971 than for the years 1972 through 1987, the method of the district court seems to us more fair and exact than that proposed by Moore-McCormack.[3]

Moore McCormack further complains that the awards to the Richardson children for loss of nurture were excessive. The district judge found that the fair value of the lost care, guidance and training to each of the two daughters during minority was $1,000 per year.

3 The district judge employed, and we approve, this method in computing present value with respect to the other claims

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There was evidence to support an award for loss of a father's care, guidance and training. See *Norfolk & Western Ry.* v. *Holbrook*, 235 U. S. 625 (1915); *Sipes* v. *Mich. Cent. R. R. Co.*, 231 Mich. 404, 204 N. W. 84 (1925). As the two daughters were aged 7 and 4 respectively in October of 1954, it was necessarily difficult for the claimant to supply much evidence concerning the father's contribution to the tr ining of his daughters. It was testified that Richardson was an attentive father, concerned with the welfare of his children and that he spent as much time as he could with them during his periods of shore leave. From his prior record and character there was good reason to believe that he would have made a real contribution to their nurture, guidance and training, particularly in future years. An award for the loss is therefore justified. See 2 Harper & James, The Law of Torts, §25.14 (1956), McCormick, Damages, §99 (1935). Although the compensation is generous, substantially more was awarded for loss of nurture in both *Meehan* v. *Central R.R. Co. of New Jersey*, 181 F. Supp. 594, 621-622 (S. D. N. Y. 1960) ($1,200 per year to each child) and *Rogow* v. *United States*, 173 F. Supp. 547, 561-562 (S. D. N. Y. 1959) ($1,420 per year to each child). In *Meehan* and *Rogow* there may well have been evidence of greater loss, particularly since here the deceased were seamen necessarily absent from home much of the time, but all such distinctions are adequately reflected in the comparative modesty of the awards presently reviewed.

We therefore modify the Richardson award by reducing the amount allowed for pain and suffering from $7,350 to $3,675. The district court properly offset against the award sums paid to Richardson's widow under a liability insurance policy (derived from the Second Seamen's War Risk Policy) taken out by petitioner and on which all premiums had been paid by petitioner. See *Lawson* v. *United States*, 192 F. 2d 479 (2 Cir. 1951); *O'Connor* v.

United States, 269 F. 2d 578 (2 Cir. 1959); 2 Harper & James, Law of Torts, §25.22 (1956). The award as modified therefore totals $175,186.

Claims From the Death of Edward T. Wall

Edward T. Wall had been the vessel's chief engineer. The court found that he died after twenty-seven hours in the water. Thirty-four years of age at the time of his death he left a widow, and three children, aged 16, 10 and 3. The district judge allowed damages to each of the three children at the rate of $1,000 per year for loss of care, guidance and training until they became 21 years of age.

For the reasons previously given we reduce the damages allowed for pain and suffering from $8,100 to $4,050. We affirm the awards for loss of nurture. The total awarded on this claim is therefore reduced from $190,159 to $186,109.

Claims From the Death of Lawrence Berk

Lawrence Berk, third assistant engineer on the "Mormackite," was twenty-five years old at the time of his death. He was unmarried and lived with his parents and younger brother, Norman, whose ages were respectively 54, 46 and 14 years. The district judge found that Berk had died after ten and one-half hours in the water.

For loss to Berk's parents of future benefits,[4] the lump sum of $20,000 was allowed. As Moore-McCormack points out, this is sufficient to provide an annuity of $1,000 per year to the parents for the normal life expectancy of their

4. Not challenged is the award to the parents of $5,000 for contributions lost during the years 1955 through 1959.

deceased son, despite the fact that they would normally have predeceased him by a considerable period of time. Moreover, the evidence shows that neither of Berk's parents were dependent upon him for their normal living expenses nor is it likely that they would thereafter have been forced to look to him for the major portion of their living expenses. In any event, in view of the trial judge's finding that Berk would have married by the time he reached the age of thirty in 1959, it is highly improbable that Berk would have been able to give or would have given to his parents so substantial a sum as was here awarded. We agree with the district judge that Berk's unusual generosity in contributing $7,200 to the cost of his parents' house is not a reliable indication of the extent of his future generosity, particularly since this house, at the time of its purchase, was Berk's home as well. Under these circumstances Berk might reasonably be expected to give, at the very most, $500 per year during the twenty-five years of life expectancy of the younger parent at the time of the decree. The present value of an annuity of $500 per year for twenty-five years discounted at 4% is $7,811. Recognizing that Berk might from time to time make special gifts to his parents, we think a proper allowance was $10,000 and accordingly we reduce this portion of the award from $20,000 to $10,000.

For the reasons already stated the award for pain and suffering must be reduced from $3,100 to $1,550. Properly offset against the award were sums paid under a seamen's insurance policy, see Richardson claim, *supra*. The total award is therefore reduced from $23,850 to $12,300.

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Claims From the Death of Carmen Cadiz

Carmen Cadiz, thirty-eight, the third cook, was survived by his widow and two sons, age 33, 10 and 9 years respectively. The trial judge found that Cadiz survived for ten hours in the water before his death and awarded $3,000 for pain and suffering.

The district judge awarded to the widow and two children a total of $51,750 for loss of contributions resulting from Cadiz's death, based upon the finding that Cadiz would have earned an average of $4,200 from 1955 until he reached the age of sixty-five in 1981. In arriving at this finding, the district court relied in part upon a stipulation as to Cadiz's annual earnings for the period 1951 through 1954, indicating that these earnings averaged $4,300 per year. As neither the stipulation nor the record shed any light on whether the stipulated earnings represent Cadiz's income before taxes or after taxes, there is no basis for disturbing this finding of the district court.

Cadiz spent only six months on ship during each of the years 1952 and 1953, but was at sea seven of the nine months preceding his death in 1954. Accepting the trial judge's conclusion that Cadiz's improved industry, as evidenced by his work record in 1954, would probably have endured for but a few years, and taking into account that Cadiz had satisfactorily completed a course as second cook and baker barely a month before his death, we conclude that the finding as to Cadiz's probable earnings has substantial support in the record.

The district judge also awarded $750 per year to each child until that child reached twenty-one for loss of the care, guidance and training of a father. There is sufficient evidence in the record of the deceased's good character and the interest which he took in his children to justify an award for loss of nurture. Since the awards are not clearly excessive, they must be affirmed.

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We reduce the damages for pain and suffering from $3,000 to $1,500.

The sum of $5,300 paid under a seamen's insurance policy was properly offset against the award. Consequently the total award is reduced from $65,380 to $63,880.

Claims for Injuries to Remy Rosario

Rosario, the boatswain, was forty-three years of age at the time of the sinking of the "Mormackite." He was rescued after forty-nine and one-fourth hours in the water. The district judge awarded $45,000 for "pain anl suffering from the sinking to the present, and in the future, and for future psychiatric care." Since damages for pain and suffering while in the water were computed at the rate of $300 per hour, the award for post-rescue pain and suffering and for future psychiatric care comes to $30,225.

While we can easily segregate damages for pain and suffering while in the water from damages for pain and suffering after rescue, there must here be a remand since the district judge not only has not indicated what portion of the award is to pay the estimated cost of future psychiatric care and treatment but has also failed to indicate his method of computing the award for future psychiatric care.

For us to attempt to repair these omissions would require us to pass upon the credibility of the medical testimony. We think it inadvisable, whatever may be our power in this respect to embark "without a pilot, rudders, compass or radar on an amateur's voyage on the fog-enshrouded sea of psychiatry," Frank, *J.*, concurring in *United States v. Flores-Rodrogues*, 237 F. 2d 405, 412 (2d Cir. 1956), particularly since we have not had the benefit of hearing and observing the expert witnesses as did the trial judge.

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The district court should make findings in sufficient detail so that the parties may know how the awards have been computed and a meaningful review may be had, *Dwyer* v. *Socony-Vacuum Oil Co.*, 276 F. 2d 653 (2d Cir. 1960); *Alexander* v. *Nash Kelvinator Corp.*, 261 F. 2d 187, 191 (2d Cir. 1958), by estimating the length of time during which psychiatric treatment would be required, the number of treatments necessary, and the cost of each treatment. The district court need not take into account the possible availability of free out-patient treatment in city clinics or hospitals or hospitals in other localities. It was conceded by Moore-McCormack that no public health service out-patient facilities equipped to render psychiatric treatment are available in the New York City area. Whatever benefits may be provided to the public at large or to Rosario by virtue of his employment by Bellevue Hospital must be considered as received from a "collateral source." See 2 Harper & James, Law of Torts, §25.22 (1956). We do not think that Rosario may be required to mitigate by moving from his home to avail himself of free out-patient facilities elsewhere. No more is he to be expected to hospitalize himself merely because free hospitalization is available while free out-patient facilities are lacking. We do not here deal with the shipowner's right to mitigation for free medical care already received, particularly from institutions designed to ease the shipowner's ancient burden of furnishing maintenance and cure. See *Ibid.* and cases cited in the annotation at 68 A. L. R. 2d 876 (1959).

Also awarded to Rosario was $20,190 for loss of future earnings. We cannot tell whether the district judge postulated his finding of an average future annual wage loss of $1,700 on Rosario's annual average wage loss of $1,680 for the five years following the sinking or on the average annual loss of $1,360 for 1958 and 1959. Since there must be a remand in any event, we think the district judge should

clarify the basis for his award for loss of future earnings. In calculating the average annual loss, the year 1955 during which Rosario worked only one month at sea and earned a total of $900 should be excluded from the calculation. As we have previously indicated, damages for pain and suffering while in the water should be allowed at the rate of $150 per hour.

Claims for Injuries to Pedro De Jesus

Pedro De Jesus, a wiper on the "Mormackite," was fifty-two and one-half years of age at the time of the sinking. He was rescued after forty-nine and three-fourths hours in the water and was awarded $14,925 for what he thus endured.

The district court awarded $35,000 for "past and prospective pain and suffering and for future psychiatric care." The court made no findings from which we can tell how it arrived at the remainder of $20,075, and accordingly we must remand for more detailed findings in which the district court should indicate the extent to which it has taken into account De Jesus' extensive prior medical history.

The award of $9,100 to De Jesus for loss of future earnings also cannot stand upon the present findings. In January and in August 1957 De Jesus was declared temporarily unfit for sea duty. Finally, in July 1958 he was found unfit for sea duty for an indefinite time and advised to seek employment ashore. He has not heeded that advice. The record does not show to what extent the award for loss of future earnings is based upon an actual disability and or upon an unavailability of work ashore rather than upon De Jesus' unwillingness to seek employment ashore. Cf. *Wiseman* v. *Sinclair Refining Co.*, 290 F. 2d 818 (2 Cir. 1961).

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Claims for Injuries to Tadeo Del Valle

Del Valle, an able-bodied seaman on the "Mormackite," was fifty-five years of age at the time of the sinking.

The district court awarded Del Valle $35,000 for "past and future pain and suffering, and permanent mental illness," of which $14,700 was for the forty-nine hours he spent in the ocean before rescue. Therefore the award for post-rescue pain and suffering and for permanent mental illness amounted to $20,300.

The uncontradicted medical testimony at the trial showed that Del Valle was suffering from a permanent mental disability and this was amply corroborated by the other evidence. In January 1956 Del Valle entered a Veteran's Hospital, the records of which state that he was then suffering from a "schizophrenic reaction, paranoid type, moderately severe" precipitated by the foundering of the "Mormackite." The degree of incapacity is there given as "severe" and the prognosis was "guarded." The Veteran's Administration granted the claimant a full disability pension (which he is still receiving) in connection with the resulting "complete and service-connected" disability. Del Valle was hospitalized a total of seven months in September 1956. On September 26, 1957, Moore-McCormack rejected an application for employment by the claimant on the ground of "mental disorder." It is conceded by Moore-McCormack that the "Mormackite" experience "caused or materially contributed" to the claimant's breakdown in 1956. Del Valle has not been at sea since January 6, 1958, but has lived on his savings on a seven acre farm in Puerto Rico.

We have fully considered Del Valle's history of prior mental disturbance and his prior partial incapacity. Nonetheless we conclude that the award, although quite liberal, is not clearly erroneous.

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The award for pain and suffering prior to rescue must be reduced from $14,700 to $7,350 and the total award from $47,565 to $40,215. As so modified, the award is affirmed with interest from June 3, 1960.

Pre-Judgment Interest

In their cross-appeals the four death claimants urge that the district court should have granted interest as damages from the date of death to the date of the decree, June 3, 1960, on the awards for pecuniary loss to the decedents' dependents,[5] as was done in *National Airlines* v. *Stiles*, 268 F. 2d 400 (5 Cir. 1959). The district court refused moratory interest (interest as damages), allowing interest only from the date of the decree. We conclude that these claims should be remanded to the district court for the allowance of pre-judgment interest. Cf., *Newburgh Land & Dock Co.* v. *Texas Co.*, 227 F. 2d 732 (2 Cir. 1955).

Damages for pecuniary loss are recoverable under the Death on the High Seas Act, 46 U. S. C. §761 *et seq.* Section 761 provides that "the personal representative of the decedent may maintain a suit for damages * * * in admiralty." Under admiralty practice the district court has a measure of discretion in allowing and fixing moratory interest.[6]

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5. No claim is made for interest on damages awarded for the seamen's conscious pain and suffering prior to death. The personal injury claimants have not cross-appealed from the decree which allowed them interest only from the date of the decree, June 3, 1960.

6. See, e.g., *The Wright*, 109 F. 2d 699 (2 Cir. 1940); *Afran Transport Co.* v. *The Bergechief*, 285 F. 2d 119 (2 Cir. 1960); *Geotechnical Corp. of Delaware* v. *Pure Oil Co.*, 214 F. 2d 476 (5 Cir. 1954); *The President Madison*, 91 F. 2d 835 (9 Cir. 1937); cases collected in 36 A. L. R. 2d 337, 354-356, 358-364 (1954), supplementing 96 A. L. R. 18, 20-30, 32-42 (1935).

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Moore-McCormack urges several objections to the allowance of moratory interest: First, it is argued, the failure of the Congress to provide expressly for pre-judgment interest on claims in admiralty indicates an intent to preserve the ancient rule permitting pre-judgment interest on claims termed "liquidated" while denying it as to "unliquidated" claims such as those here in question. Second, it is contended that we should follow decisions in this circuit in actions at law under Jones Act and F. E. L. A. provisions (also not expressly providing for moratory interest) which have recognized that, at least at law, interest is not allowed for the period between occurrence of the tort and entry of judgment.[7] Third, it is urged that this court should, as a matter of policy, hold that pre-judgment interest may not be given on damages for pecuniary loss resulting from a tortious death.

If it was the intention of Congress to bar recovery of moratory interest on "unliquidated" death claims, we are of course bound. But the hoary distinction between "liquidated" and "unliquidated" claims, criticized by eminent authority well before the enactment in 1920 of the Death on the High Seas Act,[8] has never become so firmly entrenched in admiralty as it has been at law. The trend in admiralty prior to enactment of the statute had been to-

7. See *Casey* v. *American Export Lines*, 173 F. 2d 324, reversed 176 F. 2d 337 (2 Cir. 1949); *Cortes* v. *Baltimore Insular Line, Inc.*, 66 F. 2d 526 (2 Cir. 1933).

8. 1 Sedgwick, Damages, §300 (9th Ed. 1913):

> "But the objection to this classification lies not only in its difficulty of application * * * but in the fact of its unfairness. There is no reason why a person injured should have a smaller measure of recovery in one case than the other * * *. On general principles, once admitted that interest is the natural fruit of money, it would seem that wherever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date."

ward allowance of pre-judgment interest on claims for negligent or wrongful death.[9] The Death on the High Seas Act merely instructs that "the recovery shall be a fair and just compensation for the pecuniary loss sustained." 46 U. S. C. §762. We see nothing in this language to indicate that the Congress did not intend that the damages should give full compensation for *all* pecuniary loss sustained including that resulting from delay in being compensated. See 36 A. L. R. 2d 337, 345 (1954).

Awards for financial loss to dependents, as distinguished from damages for pain and suffering, are intended to compensate for a pecuniary deprivation.[9a] McCormick, Damages, §56 (1935). There would seem to be no reason why the delay in receipt of compensation for pecuniary loss should not likewise constitute a "pecuniary loss." Cf. *Frasier* v. *Public Service Interstate Transport Co.*, 254 F. 2d 132 (2d Cir. 1958). There is surely considerable loss in having to wait over seven years before the judgment is entered and paid; this is the kind of loss for which compensation is customarily given by the payment of interest.

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9. Compare *Thompson Towing & Wrecking Ass'n* v. *McGregor*, 207 Fed. 209, 221 (6 Cir. 1913) and *Union Steamboat Co.* v. *Chaffin's Adm'rs*, 204 Fed. 412 (7 Cir. 1913) with *Burrowes* v. *Lowensdale*, 133 Fed. 250 (9 Cir. 1904).

9a. We consider the allowances for loss of nurture as "awards for financial losses to dependents." The guidance of a parent in matters material, moral and spiritual is of a definite practical and financial value and is subject to pecuniary estimate. *Michigan Cent. R.R.* v. *Vreeland*, 227 U. S. 59, 71 (1913); *Briscoe* v. *United States*, 65 F. 2d 404 (2 Cir. 1933); see *Mechan* v. *Central R.R. of N. J.*, 181 F. Supp. 594, 606, 607, 621 (S. D. N. Y. 1960); cf. *Sabine Towing Co.* v. *Brennan*, 85 F. 2d 478 (5 Cir. 1936); accord *Rogow* v. *United States*, 173 F. Supp. 547, 561 (S. D. N. Y. 1959). See also 2 Harper & James, The Law of Torts, §25.14 (1956); McCormick, Damages, §99 (1935).

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All the Jones Act and F. E. L. A. decisions denying pre-judgment interest to which our attention has been directed rest either upon specific statutory interpretation in the light of the formerly uncritical acceptance of the "liquidated-unliquidated" distinction at common law,[10] or on a rigorous interpretation of 28 U. S. C. §1961,[11] a statute applicable only to civil cases which provides for interest from the date of entry of judgment.

The first F. E. L. A. was enacted in 1906,[12] when pre-judgment interest was generally limited to liquidated claims. This distinction was carried over into decisions under the Jones Act, perhaps with good reason in view of the latter statute's express incorporation of F. E. L. A. provisions. See 46 U. S. C. §688. Both statutes provided for an action at law, with right to trial by jury, although Jones Act suits could also be brought in admiralty.[13] Both statutes

10. *Casey* v. *American Export Lines, supra*, note 7; *Cortes* v. *Baltimore Insular Line, Inc., supra*, note 7; *Louisiana & Arkansas R.R. Co.* v. *Pratt*, 142 F. 2d 847 (5 Cir. 1944); *Cleveland Tankers* v. *Tierney*, 169 F. 2d 622 (6 Cir. 1948); *Lynott* v. *Great Lakes Transit Corp.*, 202 App. Div. 613 (4th Dept. 1922), affirmed 234 N. Y. 626 (1922).

11. Compare: *Briggs* v. *Pennsylvania R.R. Co.*, 164 F. 2d 21, 23 (2 Cir. 1948), affirmed on other grounds, 334 U. S. 304 (1948), with *President & Directors of Manhattan Co.* v. *Kelby*, 147 F. 2d 405 (2 Cir. 1945), cert. denied, 324 U. S. 866 (1945); see also *Powers* v. *New York Central R.R. Co.*, 251 F. 2d 813 (2 Cir. 1958); *Murphy* v. *Lehigh Valley R.R. Co.*, 158 F. 2d 481 (2 Cir. 1946); *Louisiana & Arkansas R.R. Co.* v. *Pratt, supra*, note 10; *Cleveland Tankers* v. *Tierney, supra*, note 10.

12. The Employers' Liability Act of June 11, 1906, c. 3073, 34 Stat. 232, declared unconstitutional in the *Employers' Liability Cases*, 207 U. S. 463 (1908), was re-enacted with slight alteration to meet consttiutional objections, April 22, 1908, c. 149, 35 Stat. 65.

13. We do not reach the question, unresolved in this circuit, as to whether interest *qua* damages may be given upon any portion of the recovery in a Jones Act suit brought in admiralty. See discussion in *Moore-McCormack* v. *Amirault*, 202 F. 2d 893 (1 Cir. 1953).

envisaged a recovery for pain and suffering and for injuries to the date of trial and thereafter, the computation of interest on which might well be far more confusing to the average jury than to a judge. See *National Airlines* v. *Stiles*, *supra*, at 406. In any event, no one would be so naive as to suppose that juries do not throw into the scales the years that a plaintiff may have had to wait before his case can be heard by a jury. The practical reason why the courts in jury cases have refused to grant moratory interest may therefore be found in the judicial recognition that a jury usually makes some allowance for loss caused by delay.[14] Likewise judges doubtless make some allowance for loss because of the law's delay. It would seem to us to be better to recognize this and have the computation made on a basis which is known and understood.

Interest was never refused on unliquidated claims from any doubt that some financial loss is actually suffered from delay in receiving money. Theoretically, refusal was based on the concept that interest was payable only on a "debt" and that no debt could be due until the liability had been fixed. See *Frazer* v. *Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. 620 (1886). McCormick traces the distinction to a survival of the medieval distaste for interest as "usurious." McCormick, Damages, §§51, 55 (1935 Ed.). A further explanation sometimes advanced is that a debtor should not be burdened with pre-judgment interest upon an obligation so nebulous that he must necessarily look to the courts to fix its scope. Similar considerations would, however, seem to support the disallowance of pre-judgment interest where liability is in doubt as to a "liquidated" claim. But since the courts have not seen fit to deny pre-judgment in-

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14. Cf. *Frasier* v. *Public Service Interstate Transport Co.*, 254 F. 2d 132 (1958). See also *Powers* v. *New York Central Railroad Co.*, 251 F. 2d 813, 819 (2 Cir. 1958) [dissent]; 64 Yale L. J. 1019 (1955); Restatement, Torts, §913(2).

terest in the latter case, we see no reason why they should not grant it in the former.

We think, therefore, that when a court fixes damages to compensate for a loss which occurred in the past, there should be some allowance for the period between the date of the loss and the date of the judgment. Recompense may thus be given for the further loss in the postponement of the receipt of compensation. In all too many instances the delay in reaching cases for trial brings suffering and privation to those who were dependent on the deceased. Even the more fortunate of the bereaved may have been forced to borrow money at interest to meet their expenses.[14a]

As ancient as the injured's plaint of "the law's delay,"[15] is the use of that delay as a means by which a defendant may obtain a more favorable settlement. But whether an action has been *deliberately prolonged or* not, the defendants who are ultimately directed to pay have had the use of the money declared to be due. If it be only fair to discount sums paid now on account of future loss which would not be due until some years in the future, see *Chesapeake & Ohio R. R. Co.* v. *Kelly*, 241 U. S. 485 (1918); *O'Connor* v. *United States*, 269 F. 2d 578, 585 (2 Cir. 1959), it is, by the same token, inequitable not to make appropriate

14a. That an award of interest is necessary to fully indemnify a plaintiff whose property is lost through the defendant's willfulness or negligence was recently recognized in principle by all the judges of the New York Court of Appeals in *Purcell* v. *Long Island Daily Press Pub. Co.*, 9 N. Y. 2d 255 (1961). See also *Hamm* v. *Noble*, 296 N. Y. 262 (1947). Although the federal courts do not go so far as New York and give interest on death claims from the date of death as a matter of right, see New York Decedent Estate Law §132, we note that although an admiralty judge has discretion to refuse an award of interest "the award is to be made whenever damages lawfully due are withheld, unless there are exceptional circumstances to justify the refusal." *The Wright*, *supra*, note 6, 169 F. 2d 699, 702.

15. Shakespeare, Hamlet, Act III, Sc. 1 is but a modern version

compensation for delay in discharging the obligation. McCormick, Damages, §56 (1935 Ed.). Here the delay is not the fault of the plaintiffs and while it may equally not be the fault of the defendant, the plaintiffs have lost and the defendant has benefited.

We do not think, however, that the claimants are necessarily entitled to pre-judgment interest at the full legal rate. Although the claimants are entitled to compensation for delay, the conduct of Moore-McCormack has not been, so far as we can now determine, either so reckless or so wanton as to justify imposition of a penalty. An allowance of interest at the full legal rate would seem based on the unrealistic assumption that the claimants would have invested all they received so skillfully as to yield a return above that given by prudent investments not requiring special skill and attention by the investor. It would thus appear that interest should properly be allowed at a rate, within the discretion of the district judge, which may well be[5] something less than the full legal rate. *Chemical Bank & Trust Co.* v. *Prudence Bonds Corp.*, 207 F. 2d 67, 77 (2 Cir. 1953); *King* v. *Talbot*, 40 N. Y. 76 (1869). Since the allowance for loss of future benefits to the dependents of the four deceased men are discounted at 4%, it would seem appropriate for the district judge also to compute interest at a 4% rate on the allowances for pecuniary losses sustained prior to decree. Of course interest on sums past due will not run from the date of death, but from the several dates at which the sums would have accrued. See *Danskin* v. *Pennsylvania R.R.*, 83 N. J. L. 522, 83 Atl. 1006 (1912).[16]

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16. Until entry of the decree on mandate no duty to pay the judgment rate of interest on the unliquidated compensatory interest (which, as we have noted, is an element of damages) can arise. *Chemical Bank & Trust Co.* v. *Prudence Bonds Corp.*, 213 F. 2d 443 (2 Cir. 1954). Here compensatory interest will run from the several beginning dates up to and including the date of entry of the

Appendix

The Decree

Right to Injunction

The district court refused to enjoin future prosecution of death and personal injury claims arising out of the foundering of the "Mormackite." Moore-McCormack claims that the court below erred in failing to include "the usual injunction" in its formal decree. We hold that, having failed in the attempt to limit liability on the seamen's claims, petitioner is not entitled as to such claims to further benefit from the Limitation Act. Consequently the injunction was properly refused.

It does not appear that any claimants failed to file in this proceeding; if any such there be, the applicable statute of limitations must, with possible rare exception, be presently a bar. Claimants who have appeared in the action are, of course, necessarily bound by settlement or by *res adjudicata*.

The hypothetical claimant who has not filed his claim has not complied with the directive language of Admiralty Rule 51, para. 3: "All persons having such claims *must*

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decree on mandate, save to the extent the running of compensatory interest has been tolled by payment of principal into the registry of the district court or to a claimant's proctor, and will not cease to run as of June 3, 1960, the date of the original decree.

Thus, if $1,000 was due five years prior to entry of the decree, and if $800 was paid into the registry at the time of the original decree, and the decree on mandate issues one year after the original decree, $200 moratory interest would be due on the $1,000, a further $4 would be due on the $100 balance and interest would run at 6% on the total due ($304) from the date of entry of the decree on mandate.

In setting off payments by petitioner or on seamen's policies against the awards, it is to be presumed, unless the terms of payment are otherwise, that each payment was intended to apply against that portion of the award most in arrears.

file them." [Emphasis supplied.] Were the policy of concourse, that is the ingathering of all possible claimants before a single forum, to be exalted above all else, a reasonable legislative scheme might possibly provide for forfeiture of unfiled claims. But the Congress has not seen fit to so decree and forfeiture is not lightly to be inferred. Concursus obtains so far as necessary to protect a petitioner's claim to limited liability and, if liability is limited and the fund inadequate, to enable the court to adjudicate between competing interests.[17] Once limitation is denied, a petitioner's defunct claim to limitation can plainly no longer be imperiled. Nor, save in the event of insolvency, is there a limited fund to be divided among competing claimants. The provisions of the Limitations Act, therefore, no longer control. As was said in *Lake Tankers Corp.* v. *Henn*, 354 U. S. 147, 153 (1957):

> "It follows then that there be no reason why a shipowner * * * should be treated any more favorably than an airline, bus or railroad company. None of them can force a damage claimant to trial without a jury. They, too, must suffer a multiplicity of suits. Likewise, the shipowner, so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties in damage actions. The Act, as we have said, was not adopted to insulate shipowners from liability but merely to limit it to the value of the vessel and the pending freight."

Limitation was here granted only as to cargo claims. With respect to such claims the restraining order has been properly continued and made permanent. The seamen's

17. *Providence & N. Y. S.S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578 (1883); *Butler* v. *Boston Steamship Co.*, 130 U. S. 527 (1889); *The "Scotland,"* 105 U. S. 24 (1881), *ex parte Slayton*, 105 U. S. 451 (1881).

claims were not to be similarly impeded, for once the shipowner is found not entitled to a limitation,

> "* * * his liability will be unlimited and there will be no need for a concourse to marshal the various claims. In that event the claims will no longer be 'subject to limitation' within the meaning of Admiralty Rule 51 and, therefore, any order denying the owner's right to limitation should contain provisions for lifting the restraining order. At that time the claimants may elect to pursue their claims to judgment in the admiralty court or pursue their rights under the Jones Act." In re Wood's Petition, 230 F. 2d 197, 199 (2 Cir. 1956); see also Pershing Auto Rentals, Inc. v. Gaffney, 279 F. 2d 546, 552 (5 Cir. 1960).[18]

But rather than depart from the forum, all personal injury and death claimants present in the action stipulated that the issue of damages might be tried to the admiralty court. We do not think that by so doing they have subjected themselves to the extraordinary sanction of an injunction, a safeguard to which petitioner would plainly not be entitled had these claims been prosecuted elsewhere.

Nor are hypothetical claims not yet presented to be barred from proper forums. Those who failed to file in response to the monition may not share in the limitation fund; had petitioner's right to limit been sustained, they

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18. *See Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207 (1927); *Just v. Chambers*, 312 U. S. 383 (1941); *Spencer Kellogg & Sons v. Hicks*, 285 U. S. 502 (1932). As was noted in *Wood's Petition*, *supra*, at 199-200, n. 10, these cases merely establish the continuing jurisdiction in admiralty to dispose of the remaining issues at the behest of the claimants after denying limitation. It was recognized in *Maryland Casualty Co. v. Cushing*, 347 U. S. 409 (1954), that restrained actions might, under certain circumstances, be continued elsewhere once limitation proceedings had been concluded.

would not be permanently enjoined from prosecuting their claims elsewhere. But limitation was denied; the injunction may not issue.[19]

The Limitation Fund

The petitioner also urges that the limitation fund should be divided pro-rata among all the claimants: death, injury and cargo. Limitation has here been granted as to the cargo claimants but not as to the seamen claimants who "may, having reduced their claims to judgment, reach by normal process any of the owner's available assets." Gilmore & Black, Law of Admiralty, §10-40 (1957 Ed.); see Benedict, Admiralty, §527 (6th Ed.). Under the thesis advanced, death and injury claimants with access to a "fund" ample to satisfy their judgments, for it does not appear that Moore-McCormack is insolvent, would be required to first dip into a fund, already pitifully inadequate, to the great prejudice of the cargo claimants who are without other recourse. The proper answer, we think, was given in *The Virginia*, 266 Fed. 437, 439 (D. C. Md. 1920): "If the petitioners were insolvent, the passengers would be doubtless entitled to share in the proceeds of the res; but that would be their right and not that of the shipowners."[20]

A limitation proceeding is "the administration of equity in an admiralty court" and "all the ease with which rights can be adjusted in equity is intended to be given to the proceeding." *Hartford Accident & Idemnity Co.* v. *South-*

19. Petitioner contends that "there can be no doubt" as to its right to a perpetual injunction against persons who have filed claims herein which have been settled. In *The Foscolino* 5 Asp. 420 (P. D. 1885), the sole case on which petitioner relies, limitation had been granted.

20. See Gilmore & Black, *supra*, §10-40, as to the problems posed in insolvency situations.

ern Pacific Co., 273 U. S. 207, 216 (1927); see also *British Transport Comm'n* v. *United States*, 354 U. S. 129, 137 (1957); *Just* v. *Chambers*, 312 U. S. 382, 386-87 (1941). It follows, therefore, that the equitable doctrine of marshalling assets prevails in a court of admiralty and that, not only may not the shipowner insist that no-limitation claimants deplete the limitation fund, but it is the positive duty of the court to protect the cargo claimants by requiring the death and injury claimants first to look for satisfaction of their judgments to funds which the limitation claimants cannot reach. See *Cargill Grain Co.* v. *Buffalo Barge Tow Co.*, 1941 A. M. C. 122, 128-130 (S. D. N. Y. 1940).

The argument that the "Morro Castle" amendments to the Limitation Act,[21] and especially 46 U. S. C. §183(b), were in some way intended to alter the foregoing principle is without merit. Section 183(b) merely provides that when limitation is granted, that portion of the fund available to personal injury and death claimants, if inadequate to provide them full reimbursement, will be increased to $60 per ton under certain circumstances. See H. R. Rep. No. 2517, 74th Cong., 2d Sess. (1936); Gilmore & Black, Admiralty, §10-33. Since it is clear that the other assets of the petitioner are, so far as the no-limitation claimants are concerned, in no sense a mere supplement to the fund but rather the primary source from which such claims should be satisfied, any attempt to analogize the present case to one arising under §183(c) must fail.

There being no showing that Moore-McCormack is now insolvent, the death and personal injury claimants have no rights in the limitation fund. *A fortiori* the petitioner may not share pro-rata in the fund by standing in the shoes

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21. 49 Stat. 960, c. 804 (1935); 49 Stat. 1479, c. 521 (1936).

of death and personal injury claimants with whom it has already settled.[22]

Cost of Trial Transcript

The petitioner contends that the district court erred in taxing the cost of counsel's copy of the trial minutes. We do not agree.

During the trial of this action some 7,000 pages of testimony were taken. The court at the outset directed that it be furnished daily copy. The extended nature of the trial at each phase of the proceeding and the complicated fact picture demanded careful and accurate reference to the testimony. We do not think it unreasonable under the circumstances for the trial judge to find it at least as necessary for counsel for the claimants to be provided with daily transcript as for the court itself to receive such copy.

Although at law, see *Straus* v. *Victor Talking Mach. Co.*, 297 Fed. 791 (2 Cir. 1924), in equity, see *Stallo* v. *Wagner*, 245 Fed. 636 (2 Cir. 1917), and in admiralty, see *The William Branfoot*, 52 Fed. 390 (4 Cir. 1892, per Chief Justice Fuller), the amount paid for a litigant's copy of the trial transcript was not formerly taxable, the Court Reporters Act of 1944, 58 Stat. 5, January 20, 1944, see 3, §1, expressly provided: "In the discretion of the court any part or all of the fees for transcripts may be taxed as costs in the case." Although this provision was not expressly carried forward in the Judicial Code of 1948, its substance

22. It is unnecessary to our decision to pass upon the nature of the right, if any, to share in the limitation fund which a shipowner may derive from settled claims of a class as to which limitation is granted. See Article 3(3), International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships—1957, A. M. C. 1972, 1974; Marsden's Collisions at Sea, page 202 (10th Ed. 1953) and cases cited therein.

appears in 28 U. S. C. §1290: "A judge or clerk of any court of the United States may tax as costs * * * (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case. * * *" Petitioner contends, however, that this statute does not apply to costs in admiralty by reason of 28 U. S. C. §1925 which vests the rule-making power as to costs in admiralty in the Supreme Court. The latter provision, however, expressly saves all provisions as to costs enacted by the Congress. For this reason we need not consider the continued validity of the interpretation given to the language of Admiralty Rule 46 in the *Stallo* case, *supra*.[23] See 6 Moore Federal Practice para. 54.77(7). We are of the opinion that it was not an abuse of the trial judge's discretion to tax against the petitioner the cost of a copy of the trial minutes used by counsel for the claimants.

The awards to Sullivan, Henry, Hernandez, Williams and Del Valle are modified in accordance with this opinion and as modified are affirmed. The DeJesus and Rosario claims are remanded to the district court for further proceedings in accordance with this opinion. The Richardson, Wall, Berk and Cadiz awards are modified and remanded for determination of pre-judgment interest in conformance with this opinion.

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23. *Stallo* dealt with former Equity Rule 50, 226 U. S. 662.

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IN THE

Supreme Court of the United States

October Term 1961

No. 667

In the Matter of the Petition of

MOORE-McCORMACK LINES, INC.

as owner of the S.S. "MORMACKITE,"
for exoneration from or limitation of liability.

JEAN O. RICHARDSON, individually and as Executrix of the estate of HAROLD H. RICHARDSON, *et al.*,

Petitioners,

—v.—

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

BURLINGHAM UNDERWOOD BARRON
WRIGHT & WHITE
Proctors for Respondent—

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—v.—

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

(A) As to the first question presented:

The Court of Appeals said:

> "The District Court properly offset against the award sums paid to Richardson's widow under a liability insurance policy (derived from the Second Seamen's War Risk Policy) taken out by petitioner and on which all premiums had been paid by petitioner" (Ap. 26; such references are to the appendix attached to the present petition).

Similar comment was made as to Berk and Cadiz (Ap. 28, 30).

The beneficiaries of Richardson, Berk and Cadiz were paid $5,500, $5,500 and $5,300 respectively under a policy of insurance derived from the Second Seamen's War Risk Policy, 46 C.F.R. 308.306. By statutory mandate Clause 25 of the policy provided that there was to be no duplication of payment, i.e., if there were tort liability on the shipowner, amounts paid under the policy had to be deducted from the amount of tort liability. 50 U.S. Code App. 1292(b). The same Clause 25 was carried over into the policy here (Exh. 47).

Here the insurance in question was payable to the decedents' beneficiaries in any event, i.e., whether or not death resulted from a cause for which Moore-McCormack might be liable in damages.

Petitioners concede that Moore-McCormack paid the policy premium. There is neither finding nor evidence to support their assertion that the premium payments were a condition of the decedents' employment (p. 6).

There is no conflict in the authorities. The general rule is stated in the *Restatement, Torts*:

> Section 920. Benefit to plaintiff resulting from defendant's tort.
>
> "Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable."

This rule has been consistently followed in cases where the tort feasor has conferred a benefit in mitigation of the injured person's damages, whether by insurance, contribu-

tion, gift, payment of maintenance or otherwise. *Burch* v. *United States*, 4 Cir., 261 F. 2d 418, 420; *Brooks* v. *United States*, 4 Cir., 176 F. 2d 482 (see also 337 U.S. 49); *Lawson* v. *United States*, 2 Cir., 192 F. 2d 479; *O'Connor* v. *United States*, 2 Cir., 269 F. 2d 578. To the same effect see: *Southwestern Brewery* v. *Schmidt*, 226 U.S. 162; *Schumacher* v. *Rosenthal*, 226 F. 2d 946; *McWhirter* v. *Otis Elevator Co.*, 40 F.Supp. 11; *Lundy* v. *Calmar S.S. Corp.*, 96 F.Supp. 19; *Schellenger* v. *Zubik*, 170 F.Supp. 92; *Walsh* v. *Boston Sand & Gravel*, 175 F.Supp. 411; *Wuth* v. *United States*, 161 F.Supp. 661; *Panichella* v. *Pennsylvania R. Co.*, 167 F.Supp. 345, rev'd other grounds, 268 F. 2d 72.

The cases cited by claimants* illustrate the *exception* to the rule stated in the *Restatement*. Comment e to Section 920 reads:

> "e. *Benefits Received from Third Persons.* The rule stated in this Section does not apply where • • • such benefit is the result of the forethought of the plaintiff or of a gift to him by a third person. • • •"

In each the party sought to be charged with liability had *not* provided the payments of which he sought the benefit. Here, however, Moore-McCormack procured and paid for the insurance of which these petitioners were the direct beneficiaries.

Petitioners say (p. 7) that the District Court treated the individual recipients of the insurance as identical with

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* *Standard Oil of Calif.* v. *U.S.*, 153 F. 2d 958 (9th Cir.), affirmed 332 U.S. 301; *Hudson* v. *Lazarus*, 217 F. 2d 344 (C.C.A.D.C.), *Sainsbury* v. *Pennsylvania Greyhound Lines, Inc.*, 183 F. 2d 548 (4th Cir.); *Chicago Great Western Ry. Co.* v. *Peeler*, 140 F. 2d 865 (8th Cir.); *Brabham* v. *Baltimore & Ohio R.R. Co.*, 220 Fed. 35 (4th Cir.); *Healy* v. *Rennert*, 9 N.Y. 2d 202; *Geary* v. *Metropolitan Street Railway Co.*, 73 App. Div. 441 (N.Y.); *U.S.* v. *Harue Hayashi*, 282 F. 2d 599 (9th Cir.).

the statutory beneficiaries. Not so. Compare the *Wall* case. The District Court made no deduction there, and Moore-McCormack claimed none, because the beneficiary of that policy was the mother, who was not a statutory beneficiary.

Only hardship could result if it were the rule that a tort feasor cannot lessen the amount of his liability by mitigating the injured person's damages, whether before or after the event.

No conflict exists. The law is clear and this point does not merit this Court's attention.

(B) As to the second question presented:

The District Court denied pre-judgment interest on the death damage awards on the authority of *Casey* v. *American Export Lines*, 2 Cir., 173 F. 2d 324, reversed on other grounds, 176 F. 2d 337. It also denied pre-judgment interest to the injury claimants, but they did not appeal.

The Court of Appeals "remanded to the District Court for allowance of pre-judgment interest" (Ap. 34), holding that the Death on the High Seas Act does not prohibit the allowance of interest (Ap. 35-6) and refusing to be bound by the decisions under the Jones Act and the F.E.L.A., even its own *Casey* (Ap. 37-9). The Court held that since it is fair to discount sums presently paid on account of lost contributions which are not due until the future, it is only fair to allow interest for delay in paying sums that would have been paid by the decedent, had he lived, between death and decree. The Court held, however, that claimants are not necessarily entitled to interest at the full legal rate; that this is a matter for the discretion of the District Judge, and that it would seem appropriate to allow pre-judgment interest for pecuniary losses at 4% (Ap. 39-40). The Court further held that interest on sums past due should not run

from the date of death but from several dates at which they would have accrued* (Ap. 40-1).

Although the Court did not expressly say so, it is clear that it was doing no more than exercising the discretion, which all courts have in admiralty, to allow interest in whole or in part, or disallow it altogether, as seems fair under the circumstances of each case. This is settled law. In *The Scotland*, 118 U.S. 507, this Court said:

> "The allowance of interest on damages is not an absolute right. Whether it ought or not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or jury" (pp. 518-19).

To the same effect see *Benedict on Admiralty*, 6th Ed., Vol. 3, p. 191; *Corpus Juris Secundum*, Admiralty, Vol. 2, §205b, p. 358; Norris, *The Law of Seamen*, §695, p. 387.

If the Court was free to allow any pre-judgment interest, this point does not merit this Court's attention unless discretion was abused. The Court was under no compulsion to follow *National Airlines, Inc.* v. *Stiles*, 5 Cir., 268 F. 2d 400, for at least two reasons: The decision in *Stiles* was *de novo*, the Court admitting (p. 405) that it could find no precedent under the Death on the High Seas Act although that Act had been in effect almost 40 years. Moreover the District Court in *Stiles* had, as the Court of Appeals said (p. 405), "made plain its finding that the award was a fair measure of Mrs. Stiles' pecuniary loss *as of the date of her husband's death*, and interest on the amount was awarded

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* If $1,000 would have been contributed in the first year following death, interest would run on that $1,000 from that year to decree; if another $1,000 would have been contributed in the second year, interest would run on it from *that* year to decree.

to make her recovery complete." (Italics added.) On the contrary, McGohey, *J.*, in this case fixed the damages sustained year by year and found just what were the annual increments of pecuniary loss in each death case from the year of death until the end of the expectancy of the longest-lived beneficiary. For example, in the *Richardson* case, McGohey, *J.*, found that the pecuniary benefits from the year of death through 1959 were $6,375 per annum; for 1960 through 1962 also $6,375 per annum; for 1963 through 1968, $9,225 per annum, and so on. In the light of these findings the Court of Appeals allowed pre-judgment interest on the amounts as they would have accrued year by year from the year of death to the entry of final decree. *Stiles* is, of course, no precedent in a case where there have been such findings as here. *Ches. & Ohio Ry.* v. *Kelly*, 241 U.S. 485, 489-90.

If the Court was entitled to exercise its admiralty discretion, petitioners can have no complaint that it overruled its own decision in *Casey* v. *American Export Lines*, 2 Cir., 173 F. 2d 324, and numerous other cases* holding that pre-judgment interest cannot be allowed in Jones Act and F.E.L.A. cases.

The decision below does not conflict with *Van Beeck* v. *Sabine Towing Company*, 300 U.S. 342, or *Matter of Meekin* v. *B.H.R.R. Co.*, 164 N.Y. 145, and petitioners' reliance upon them is based upon a misunderstanding. *Van Beeck* and *Meekin* held only that the pecuniary loss sustained by a beneficiary who dies before trial becomes liquidated at the moment of the beneficiary's death and, at that point,

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* *Cortes* v. *Baltimore Insular Line, Inc.*, 2 Cir., 66 F. 2d 526, reversed on other grounds, 287 U.S. 367; *Cleveland Tankers* v. *Tierney*, 6 Cir., 169 F. 2d 622, 626; *Powers* v. *New York Central R Co.*, 2 Cir., 251 F. 2d 813; *Briggs* v. *Pennsylvania R. Co.*, 2 Cir., 164 F. 2d 21; *Murphy* v. *Lehigh Valley R. Co.*, 2 Cir., 158 F. 2d 481; *Lynott* v. *Great Lakes Transit Corp.*, 202 App. Div. 613, affirmed 234 N.Y. 626.

can be considered a "property" loss. Petitioners cite no authority for the claim that they lost any property right when their decedents died. Their only right is a statutory right, one which comes into being only upon the occurrence of wrongful death. In *Sider* v. *General Electric Co.*, 238 N.Y. 64, the New York Court of Appeals expressly refuted the argument petitioners make here and took pains to explain *Meekin*—pp. 69-70. Cardozo, *J.*, who wrote *Van Beeck* and in which he cited *Meekin*, was a member of the unanimous court that decided *Sider*.

If interest is allowable at all, despite the Jones Act and the F.E.L.A. rule, the Court was plainly right in not allowing interest from the date of death because the District Court did not fix the damages it found as of the date of death. On the contrary, as appears *supra* page 6, the District Court found the damages year by year. The District Court did not discount the sums it found these death claimants had lost between the time of death and the time of its decree; on the contrary, these it allowed in full, and discounted only the awards for what it found the death claimants would have received in the years which still lay ahead at the time of its decree. To allow interest from the date of death would unfairly enrich these death claimants who could never have received the contributions they claim to have lost except over a long period of time, much of which is still in the future. Against this background the Court was plainly right in saying:

> "Of course interest on sums past due will not run from the date of death, but from the several dates at which the sums would have accrued" (Ap. 40).

As to the allowance of interest at four per cent rather than six per cent, the Court of Appeals said:

> "The allowance of interest at the full legal rate would seem based on the unrealistic assumption that

> the claimants would have invested all they received so skillfully as to yield a return above that given by prudent investments not requiring special skill and attention by the investor. * * * Since the allowance for loss of future benefits to the dependents of the four deceased men is discounted at four per cent, it would seem appropriate for the District Judge also to compute interest at a four per cent rate on the allowances for pecuniary losses sustained prior to decree" (Ap. 40).

There is no abuse of discretion here.

There are two other objections to granting a writ to consider this question. It is to some extent premature because the District Court has not yet decided how far it will follow the admonition of the Court of Appeals and has not made the contemplated calculations envisaged by the Court of Appeals' examples in footnote 16 as to how its decision should be applied. Also the question is to some extent moot because very large parts of the death damage awards have been paid. For example, in the Richardson case the District Court awarded $31,875 for pecuniary benefits already lost and $118,296 for future benefits. Shortly after the decree was entered Moore-McCormack paid all of this but about $5,000, with interest from date of decree to date of payment. In the Wall case the District Court awarded $40,194 and $111,625 for pecuniary benefits already lost and for future benefits, respectively, and shortly after the decree was entered Moore-McCormack paid all of this but about $5,000, with interest from decree to date of payment. Corresponding payments were made in the Cadiz and Berk cases.

If a writ is granted, respondent will urge that the Court of Appeals erred in allowing any pre-judgment interest.

(C) As to the third question presented:

The findings of the District Court as to conscious pain and suffering while in the water until death or rescue were, *in toto:*

> "All of the survivors were weak and weather-worn when they were taken from the water at various times on the morning of October 9. They had been without food and drink for from 46 to 50 hours; their eyes and throats were irritated by the salt water; the rubbing of their life jackets and of the boards they hung onto caused multiple abrasions of their chests, arms and legs; until rescued they all feared for their lives. It is a reasonable assumption that, up until he died, each deceased suffered similarly. I find he did."

The District Court appraised these experiences at $300 per hour. There is nothing in the Court's findings to support petitioners' assertion (p. 13) that the hourly rate was based on effects of the experience in the water which were still observable* when some of the survivors testified at trial.

On appeal, Moore-McCormack accepted the District Court's findings as to the nature and extent of the experience in the water, and so did the Court of Appeals (Ap. 24). However, the Court of Appeals held:

> "That we have both the power and the duty to examine awards for excessiveness, even when the awards are made by a jury, seems well established. See *Dagnello* v. *Long Island R.R. Co.*, 289 F.2d 797 (2 Cir. 1961). We do so here where the awards were made by a judge in admiralty" (Ap. 23).

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* The District Court commented on its observations of Rosario and DeJesus when they testified; however, these comments were anent the claims of these men for continuing permanent neuroses for which they were separately compensated and did not relate to pain and suffering while in the water.

After considering the District Court's findings, the Court of Appeals said:

> "We think $300 per hour for pain and suffering while in the water is excessive. * * * As the awards in each case turn on so many varied facts, no purpose would be served in citing precedents. However, from such guidance as the numerous decisions dealing with the problem afford, we conclude that the award of $300 an hour is excessive and that it should be reduced to $150 per hour" (Ap. 24).

There can be no doubt as to either the right or the duty of the Court of Appeals to make its own appraisal. This is true in jury cases, *Dagnello* v. *Long Island R.R. Co.*, 2 Cir., 289 F. 2d 797, and the numerous cases there reviewed, and, *a fortiori*, in admiralty. True, the finding below must be "clearly erroneous" but, when it is, the Court of Appeals may set it aside and make its own. *McAllister* v. *United States*, 348 U.S. 19, 20; *Petterson Lighterage and T. Corp.* v. *New York Central R. Co.*, 2 Cir., 126 F. 2d 992.

Petitioners' contention (p. 13) that the Court of Appeals may not reappraise the value of an hour of pain and suffering because it did not observe the surviving claimants who testified cannot be sound. If it were, no appellate court could ever reverse or modify for excessiveness or inadequacy. The amount of damages is a question of fact which the Court of Appeals had every right to review and redetermine if it concluded, as it obviously did, that the award below was "clearly erroneous." *Brooklyn Eastern District Terminal* v. *United States*, 287 U.S. 170. *Hildebrand* v. *United States*, 2 Cir., 226 F. 2d 215. *Mason* v. *United States*, 2 Cir. 177 F. 2d 352. *Carrol* v. *United States*, 2 Cir., 133 F. 2d 690.

The District Court made no finding of bitter pain or extreme suffering. Its findings, quoted above, were that

those who survived were without food or drink for 46-50 hours; their eyes and throats were irritated by salt water; their skin was chafed by the rubbing of life jackets and boards to which they clung; upon rescue they were "weak and weather-worn" and, until rescue, they feared for their lives. The only question presented under this point is the hourly value of this particular experience. This does not merit the attention of this Court.

(D) As to the fourth question presented:

The District Court found that Lawrence Berk, with an expectancy of 46 years, was survived by his father and mother with expectancies of 20 and 30 years respectively; that he was unmarried but would have married and established a home of his own by the time he reached the age of 30, in 1959. The Court disbelieved much of Mrs. Berk's testimony but found that Berk would have contributed "at most" $1,000 per annum to his parents in 1955 through 1959, and awarded them $5,000 for this loss and this sum has been paid. For lost contributions after 1959 the Court awarded the parents $20,000, although it found that his probable marriage in 1959 "would preclude the possibility of such continued generosity ["at most" $1,000 per annum]." Nevertheless, the District Court based the $20,000 award on the same $1,000 per annum figure. Moreover, it mistakenly assumed that contributions at that rate would be made throughout the *decedent's* lifetime, whereas it should have made an award only for the period of the *beneficiaries'* expectancies.

The Court of Appeals found:

> "For loss to Berk's parents of future benefits, the lump sum of $20,000 was allowed. As Moore-McCormack points out, this is sufficient to provide an annuity of $1,000 per year to the parents for the normal

life expectancy of their deceased son, despite the fact that they would normally have predeceased him by a considerable period of time. * * * In any event, in view of the trial judge's finding that Berk would have married by the time he reached the age of thirty in 1959, it is highly improbable that Berk would have been able to give or would have given to his parents so substantial a sum as was here awarded. * * * Under these circumstances Berk might reasonably be expected to give, at the very most, $500 per year during the twenty-five years of life expectancy of the younger parent at the time of the decree. The present value of an annuity of $500 per year for twenty-five years discounted at 4% is $7,811. Recognizing that Berk might from time to time make special gifts to his parents, we think a proper allowance was $10,000 and accordingly we reduce this portion of the award from $20,000 to $10,000" (Ap. 27-8).

This $10,000 has been paid.

The High-Speed Mathematics Table (Ex. 46), which the Court used in all cases, shows that the present value of $1,000 a year for 41 years is $19,993. This, rounded off, equals the $20,000 award. In 1959, the year from which loss of future contributions was calculated, the expectancies of the father and mother were 20 and 25 years respectively. The award for future contributions should have been computed on joint expectancies, or at most on the expectancy of the younger surviving parent, approximately one-half the number of years the Court actually used. *Briscoe* v. *United States*, 2 Cir., 65 F. 2d 404, 405; *Muratore* v. *United States*, 100 F. Supp. 276, 283, S.D.N.Y.

The Court of Appeals' recomputation was clearly right.

This point involves no question of law nor any question of general interest and does not merit the attention of this Court.

Special Prayer

Respondent prays the Court to consider with this petition its cross-petition shortly to be filed.

Respondent also prays the Court to indicate, should this petition be granted, which points it will consider and which it will not so that respondent may make full and final payment as promptly as possible to any claimants whose claims will not be before this Court.

Respectfully submitted,

EUGENE UNDERWOOD
Counsel for Respondent
Moore-McCormack Lines, Inc.

Dated: New York, New York
January 31, 1962

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IN THE

Supreme Court of the United States

October Term, 1961

No. 667

In the Matter of the Petition of Moore-McCormack Lines, Inc. as Owner of the S.S. "Mormackite" for Exoneration from or Limitation of Liability.

JEAN O. RICHARDSON, Individually and as Executrix of the Estate of HAROLD H. RICHARDSON *et al.*,

Petitioners,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This is an application made pursuant to Rule 58 of the Rules of the Supreme Court of the United States for a rehearing of a petition for certiorari made by petitioners Rosario, DeJesus, Hernandez, Henry, Sullivan, Del Valle, Williams, Cadiz and Berk, seamen and representatives of deceased seamen, suing in admiralty to recover damages for personal injuries to review the judgment of the Court of Appeals for the Second Circuit, in part reversing

and in part modifying, a District Court decree in their favor. Their original petition had been denied on February 19, 1962. The present application, not joined by original petitioners Richardson and Wall, is made in order to bring to the Court's attention matters that had not been brought to the Court's attention in the original petition.

1. In this case, the compensation for pain and suffering of the seamen while clinging to wreckage in the ocean for some fifty hours before being rescued was evaluated by the District Court at $300.00 an hour. The District Court made its evaluation on the basis of the evidence before it which included the inseparable and necessary evidentiary factor of the observable effects of the experiences on the minds and bodies of those who underwent them. The Court of Appeals, without assigning any reason for its conclusion other than it thought the award was too much, reduced the District Court's evaluation to $150.00 an hour, so doing without seeing or hearing the men so as to observe the effects of the experience on them. In other words it did not consider evidence that was available to it in deciding an admiralty cause.

Petitioners submit that this was a denial of due process under the Fifth Amendment to the Constitution of the United States.

It has been held that there is a denial of due process when a fact finding tribunal does not utilize or consider available evidence for, as has been said, "One who decides must hear". *Morgan* v. *U. S.*, 298 U. S. 468, 481. It is equally a denial of due process when the evidence not considered is demeanor evidence. *S. Buchsbaum & Company* v. *Federal Trade Commission*, 153 Federal 2d 85 (7th Cir.).

The Court of Appeals in reversing factual findings of a District Court, sitting in admiralty, acts as a fact finding tribunal. Accordingly, when it makes new findings of fact without utilizing available evidence, there is a denial of due process.

In this case, the Court of Appeals in evaluating the seamens' pain and suffering at $150.00 an hour, without the benefit of observation or examination of the seamen, so necessary to determine what the effects of their sufferings were upon them, was not considering available evidence in making its new findings of fact.

Were this a case of rate regulation, there could be no question of denial of due process were the rate fixed without giving consideration or weight to significant factors. *Southwestern Bell Telephone Company* v. *Public Service Commission of Missouri*, 262 U. S. 276. There is no perceivable difference in principle when a "rate" for pain and suffering is fixed without giving consideration and weight to such significant factors as the observable effects of the occurrence on the individuals involved, factors which could only be evaluated and weighed by a personal scrutiny and examination of those involved.

It is, therefore, submitted that the judgment of the Court of Appeals, reducing the District Court's evaluation of the compensation the men were entitled to for pain and suffering, without giving consideration to all the available evidence, was arbitrary and capricious so as to constitute a denial of due process.

2. The composition of the Court of Appeals was the Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Circuit Judge, and Hon. J. Warren Madden, Judge of the United States Court of Claims, sitting by designation. The composition of the Court is identical to that in the case of *The Glidden Company etc.* v. *Olga Zdanok*, No. 242 in which certiorari has been granted with respect to the point that the participation of Judge Madden vitiated the Court of Appeals decision. That appeal is presently sub judice. The only difference between the *Glidden* case and the instant case is that in the former the decision was non-unanimous, with Judge Madden writing the prevailing opinion, while the decision in this case was unanimous with Judge Lumbard writing the opinion of the Court.

If it be held that the participation of Judge Madden in the *Glidden* case nullifies the judgment of the Court of Appeals, then the same should be held in the instant case. This point was not brought to the Court's attention on the original petition. The reasons which led to the granting of certiorari in the *Glidden* action should lead to the granting of certiorari in this case.

It is, therefore, respectfully submitted that petitioners' application for a rehearing of their application for certiorari should be granted and upon such re-hearing certiorari granted with respect to either of the following questions, or both:

1. Was there a denial of due process in the Court of Appeals' reduction of the District Court's award for pain and suffering?

2. Did Judge Madden's participation in the hearing of the appeal nullify the judgment of the Court of Appeals?

Respectfully submitted,

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LOUIS R. HAROLDS
Of Counsel

I hereby certify that the within petition is presented in good faith and not for delay.

BENJAMIN H. SIFF